Department of State Health Services
Agenda Item for State Health Services Council
January 31, 2007

Agenda Item Title: New rules concerning the process for Local Mental Health Authority to assemble and maintain a network of service providers (provider of last resort)

Agenda Number: 5 a

Recommended Council Action:
____For Discussion Only

__X__For Discussion and Action by the Council

Background:
These rules are developed in response to Executive Order RP 45, which required that an plan be developed to implement Section 533.035 (e) through (g) of the Texas Health and Safety Code. A negotiated rulemaking process was used to develop the proposed rules, in accordance with the requirements of Tex. Govt. Code ch. 2008, concerning Negotiated Rulemaking. DSHS appointed a negotiated rulemaking committee, which first met on October 10, 2006, and continued to meet over the course of the next several months, totaling more than 100 hours of discussion and negotiations presided over by facilitators appointed by DSHS. On January 10, 2007, the negotiated rulemaking committee produced a proposed rule that had the consent of all parties. In addition, the negotiated rulemaking committee has submitted additional recommendations regarding the implementation of the rules.

Summary:
Section 533.035 of the Texas Health and Safety Code articulates a clear preference for a system of service delivery in which consumers have choice from among multiple service providers and in which the LMHA's role is to provide management and oversight. The extent to which this goal can be achieved in any given service area and how quickly it can be reached will depend on the circumstances, needs, and preferences of the local communities served by each LMHA.

The proposed new rules establish the requirements of local mental health authorities (LMHAs) in assembling and maintaining a network of service providers and set forth the conditions under which an LMHA may serve as a provider of services.

Summary of Stakeholder Input to Date (including advisory committees):
These rules were developed with all significantly affected parties at the negotiating table. Each representative solicited input from their constituents to inform the negotiations. A website was established to allow members of the public to access information on the process and to provide input.

Proposed Motion:
Motion to recommend HHSC approval for publication of rules contained in agenda item #5a.

Agenda Item Approved by: _____
Presented by: _____ Randy Fritz on behalf of Joe Vesowate **Title**: COO_____
Program/Division: _____MHSA_____ **Contact Name/Phone:_____**206-5759___

Date Submitted
1/18/17

Title 25. HEALTH SERVICES
Part 1. DEPARTMENT OF STATE HEALTH SERVICES
Chapter 412. Local Mental Health Authority Responsibilities
New Subchapter P
New §§412.751-412.754, §412.756, §412.758, §412.760, §412.762, §412.764, §412.766

BACKGROUND AND PURPOSE

The Executive Commissioner of the Health and Human Services Commission on behalf of the §533.035(b)-(f), relating to Local Mental Health and Mental Retardation Authorities. The proposed new rules establish the requirements of local mental health authorities (LMHAs) in assembling and maintaining a network of service providers and set forth the conditions under which an LMHA may serve as a provider of services.

A negotiated rulemaking process was used to develop the proposed rules, in accordance with the requirements of Tex. Govt. Code ch. 2008, concerning Negotiated Rulemaking. DSHS appointed a negotiated rulemaking committee, which first met on October 10, 2006, and continued to meet over the course of the next several months, totaling more than 100 hours of discussion and negotiations presided over by facilitators appointed by DSHS. On January 10, 2007, the negotiated rulemaking committee submitted a final report to DSHS, which includes the text of the proposed rules. This report is public information and can be found on the DSHS website at http://www.dshs.state.tx.us/mhcommunity/provider.shtm. In addition, the negotiated rulemaking committee has submitted additional recommendations regarding the implementation of the rules; these recommendations can also be found on the website referenced above.

General philosophy and approach:
Section 533.035 of the Texas Health and Safety Code articulates a clear preference for a system of service delivery in which consumers have choice from among multiple service providers and in which the LMHA's role is to provide management and oversight. The extent to which this goal can be achieved in any given service area and how quickly it can be reached will depend on the circumstances, needs, and preferences of the local communities served by each LMHA.

Section 533.035(c) charges LMHAs with responsibility for ensuring that mental health services are provided in their local service areas and, further, requires LMHAs to consider public input, ultimate cost-benefit, and client care issues to ensure consumer choice and the best use of public money in assembling a network of service providers. This language clearly recognizes that decisions regarding the structure of service delivery networks must balance a complex and diverse range of considerations and interests. These include the needs and preferences of the local community, prudent stewardship of public dollars, the need to achieve the best possible client outcomes, the right of consumers to exercise control and make decisions regarding their health, and the responsibility to achieve the greatest return on public investment in mental health services.

Given the diversity of LMHAs' local service areas and their constituent communities, it is impossible to create a single template defining the procedures and timelines for implementing

the statutory provisions that would comply with these overarching principles. Instead, the proposed rules establish a uniform process for planning and implementation that provides a framework within which each LMHA must work with stakeholders and the local communities it serves in assembling a network of providers that provides the most appropriate and available treatment alternatives to individuals in need of mental health services.

This framework incorporates checks and balances to ensure that LMHA decisions reflect an appropriate consideration of the diverse and often competing interests and needs of stakeholders at both the state and local level. First, the process is public and transparent. LMHAs are required to make public their proposed local network development plans and proposed procurement documents prior to implementation. Second, LMHAs must solicit and respond to stakeholder comments at key points in the process: in the early phases of the planning process, prior to submitting a proposed plan to DSHS for approval, and before initiating either a request for proposals or open enrollment, the two methods of procurement an LMHA is likely to use extensively in assembling or expanding its provider network. Finally, DSHS is given responsibility for reviewing and approving each LMHA's local network development plans, including the LMHA's rationale and supporting documentation, response to any public input, previous efforts, and progress toward assembling a network of external providers; DSHS may require revisions prior to approval.

The approach laid out in this subchapter accommodates the circumstances and needs of local communities across the state and anticipates considerable diversity in the plans and activities undertaken by various LMHAs. The proposed rules recognize that the unique characteristics of the local communities served by each LMHA will result in a wide variance among the LMHAs in terms of the extent and rate to which they are able to assemble or expand their provider networks to include external providers and the rate at which they are able to make the transition away from being providers of services. For example, an LMHA in a local service area comprised strictly of rural and frontier counties may find few, if any, external providers willing to locate in such a sparsely populated region. With an insufficient supply of external providers to meet local demand, the LMHA might continue to serve as the primary provider in that area for an extended period with its external provider network comprised solely of a few individual practitioners. In contrast, an LMHA located in an urban area with a large number of experienced external providers might find it realistic to implement a plan designed to transition to a largely external provider network within just a few years. Another example would include an LMHA's determination that it is necessary to be a provider of certain services in order to ensure that contracted providers are able to comply with performance standards and other contract requirements over an extended period of time, before completely divesting itself of the provider role.

DSHS expects that each LMHA's local network development plan will incorporate strategies to ensure continuous consumer access to services while the LMHA maintains a steadily decreasing share of service provision responsibilities during the transition period. In developing its local network development plan, the LMHA, while complying with the requirements of subchapter and with input from stakeholders and DSHS, will be allowed to determine the rate at which this transition period will occur.

While the proposed rules provide considerable flexibility to address local needs, they also lay out clear criteria for determining when an LMHA is authorized to provide services. These criteria, together with other provisions in this subchapter, integrate the language defining an LMHA as a provider of last resort with the broader considerations articulated in Texas Health and Safety Code §533.035(c) and provide structure for translating those considerations into decisions regarding the assembly of a provider network.

In addition to requiring LMHAs to develop local network development plans that establish the extent and rate at which external providers will be utilized, the proposed rules describe procurement practices specific to an LMHA's development of external provider networks. These provisions do not negate the application or effect of 25 TAC, Chapter 412, Subchapter B, relating to Contracts Management for Local Authorities. Those rules will be reviewed by DSHS to determine whether they should be amended or repealed, but while they are still in effect, the requirements of this subchapter will prevail if there is a conflict between those rules and this subchapter regarding an LMHA's responsibilities in contracting with providers of mental health services.

SECTION-BY-SECTION SUMMARY

§412.751 Purpose
Section 412.751 states that the purpose of the proposed rules is to establish the process for an LMHA to assemble and maintain a network of service providers, as required by Tex. Health and Safety Code §533.035(b)–(f).

§412.752. Application
Section 412.752 indicates that the proposed rules would apply to LMHAs and their use of funds disbursed to them by DSHS pursuant to Texas Health and Safety Code §533.035(b). Therefore, the proposed rules would not apply to an LMHA's use of funds other than "department federal and department state funds" disbursed to an LMHA by DSHS by contract or other allocation method. Because DSHS currently allocates federal and state funds to LMHAs through the DSHS performance contract, the proposed rules would apply to funds received by the LMHAs through the DSHS performance contract, including, for example, federal Mental Health Block Grant funds and state general revenue funds. The proposed rules would not apply to an LMHA's use of funds received through local contributions from a participating local agency pursuant to Texas Health and Safety Code §534.019, local match funds required by Texas Health and Safety Code §534.066, other contributions made to an LMHA by private or non-local funding sources, or funding from another state agency, such as the Department of Rehabilitative Services or the Department of Aging and Disability Services.

§412.753. Definitions
Section 412.753 defines certain words and terms used in the proposed new subchapter.

The term "external provider" includes all providers other than an LMHA or its direct employees. This definition is at variance with the definition of external providers utilized in the Cost Accounting Methodology (CAM) that LMHAs are required to use in reporting their costs to DSHS. The CAM definition classifies some contract employees as internal providers based on

application of criteria regarding the extent to which the LMHA controls the contracted employee's work. After review, DSHS may revise the current CAM definitions to eliminate this discrepancy.

The term, "qualified provider" is defined as (1) an individual practitioner with the minimum qualifications required by the DSHS performance contract and an LMHA's approved Local network development plan, or (2) an organization that demonstrates the ability to provide services in accordance with the requirements of the DSHS performance contract. Use of this term is consistent with the requirements of Texas Health and Safety Code §533.035(e), under which an LMHA may only serve as a provider of services if the LMHA demonstrates to DSHS that (1) it has made every reasonable attempt to solicit the development of an available and appropriate provider base that is sufficient to meet the needs of consumers in its service area, and (2) there is not a willing provider of the relevant services in the authority's service area or in the county where the provision of services is needed.

An LMHA is not required by the statute to accept any provider that is willing to provide services; it must select providers that are available and appropriate to provide the relevant services, as more specifically addressed in the requirements of Resiliency and Disease Management (RDM), an array of evidence-based disease management practices adopted by DSHS. The DSHS performance contract currently requires each LMHA to implement the requirements of RDM. The RDM Utilization Management Guidelines establish minimum qualification for individual practitioners who are providers of mental health services. In addition, RDM establishes various requirements for providers that are organizations. These include application of a uniform assessment tool to determine the necessary level of care for the client; compliance with Clinical Guidelines that establish service packages for both children and adults that ensure the provision of evidence-based services and guide decisions on eligibility and appropriate discharge from a service package; management of limited resources through established utilization management processes; compliance with the requirements of the DSHS performance contract; compliance with established quality management and data management processes; and maximization of available funding strategies.

Providers who are individual practitioners must meet not only the minimum qualifications established by the RDM Utilization Management Guidelines, but also any additional qualifications required by an LMHA's local network development plan, as provided in this subchapter. For example, bilingual capabilities may be an essential requirement for some staff providing services in areas with large Spanish-speaking populations.

The definition of "service capacity" refers to the number of adults or children/adolescents served, or to be served, for each Resiliency and Disease Management service package. Service capacity represents consumer distribution among various service packages at a given point in time, based on historical information and projected needs. This definition recognizes that service capacity is not a static number that can be determined in advance; rather service capacity among service packages will fluctuate based on the clinical needs of consumers. While service capacity must be estimated for planning and procurement purposes, the service system must remain flexible so that it can accommodate the clinical needs of individual consumers who present for services and respond as their needs change over time.

The definition of “stakeholders” encompasses all individuals and organizations who may have an interest in or who may be impacted by the implementation and consequences of these rules and is intended to exclude no one. The specific stakeholder groups named in the definition are those with a clear interest in public mental health services and the assembly of a provider network to which the LMHA should direct its outreach efforts during the network development planning process.

§412.754. Establishment of a Provider Network

Section 412.754, relating to Establishment of a Provider Network, references the general requirements of Texas Health and Safety Code §533.035(c) for an LMHA to assemble a network of service providers with consideration of public input, ultimate cost-benefit, and client care issues to ensure consumer choice and the best use of public money. The procedures and criteria found in subsequent sections of this subchapter describe how those considerations shall be applied in developing a provider network and determining the LMHA’s role as a provider of services.

Public input is specifically required at three points in each two-year network development planning and implementation period. First, LMHAs are required to ensure community involvement and effective participation of stakeholders in the development of the local network development plan. Second, LMHAs are required to seek and respond to public comments regarding the draft plan before submitting their proposed plans to DSHS for approval. Finally, LMHAs are required to provide a period for public comment regarding draft procurement instruments before using them to procure services.

Client care issues are addressed through the requirement that LMHAs and their subcontractors adhere standards of care established by DSHS, especially those defined in chapter 412, Subchapter G, of this title, relating to Mental Health Community Services Standards and the Resiliency and Disease Management system, and through the examination of a potential contractor’s past performance.

Consumer choice is addressed through the criteria used to determine an LMHA’s status as a service provider, which define a minimum level of consumer choice.

The terms “ultimate cost benefit” and “best use of public money” relate to decisions regarding the allocation of public dollars used to fund mental health services, which are provided by and/or through LMHAs (LMHAs may, under certain circumstances, provide services themselves and/or purchase services from external providers). Key decisions in determining how services are provided include the extent and rate at which external providers will provide services and whether or not an LMHA will be a provider of services. Decisions regarding ultimate cost benefit and best use of public money therefore encompass comparisons between an LMHA and one or more external providers, as well as comparisons among external providers. Ultimate cost benefit and best use of public money are closely related to “best value,” a term commonly associated with procurement activities. Within the context of this subchapter, best value is a specific term applied to procurement decisions made by an LMHA in which the LMHA selects from among competing external providers.

Considerations in determining ultimate cost benefit and best use of public money parallel those factors used to determine cost value detailed in §412.762(b), which may be broadly summarized as follows: 1) the extent to which the service conforms to established quality standards; 2) the extent to which the service meets the needs of consumers and the local community; 3) the reliability of the provider and the provider's ability to comply with applicable laws, regulations, and standards; 4) the cost of the service; and 5) the ability of the provider to work with other providers and community organizations to provide continuity of care and linkages to community-based support systems. The proposed rules address these considerations through the development of the local network development plan, procurement requirements, application of DSHS rules and standards, and the specific criteria used to determine an LMHA's status as a service provider.

Conformance with established quality standards is addressed through the requirement that all services adhere to DSHS established standards of care, especially those defined in Chapter 412, Subchapter G, of this title, relating to Mental Health Community Services Standards, and the Resiliency and Disease Management system; this requirement applies to both LMHAs and external providers. All providers meeting those standards are qualified to provide services funded through the DSHS performance contract.

The ability to meet consumer needs is also addressed through the RDM standards. In designing the RDM system, DSHS used the best available research evidence to identify those services most effective in meeting the needs of DSHS consumers and establish related standards. Local needs are currently defined in the local service area plan and, under the rules as proposed, will be defined in the local network development plan; both of these are developed with input from consumers and other stakeholders. The ability to meet consumer and local needs is also addressed in proposed §412.758, related to LMHA Provider Status, which requires a provider to demonstrate the ability to provide consumers with access to services that is equivalent to or better than that provided by an LMHA.

The reliability of the provider is addressed through the flexibility afforded to LMHAs and the local communities they serve in determining not only the percentage of service capacity that will be procured, but also the time frame within which such services will be procured. By designing a phased transition to service delivery by external providers, an LMHA can evaluate the ability of an external provider to fulfill its contractual obligations over an extended period of time. Reliability of the provider is also a factor considered in procurement; an LMHA is not required to procure services from a respondent if the LMHA has documented evidence that the provider has a clear and recent history of failing to fulfill its contractual obligations.

Cost of services is addressed through the procurement process. It is reasonable to assume that best use of public money is not achieved if an LMHA contracts for a service equivalent to that which it can provide but at a significantly higher cost, thus reducing the quantity of services that can be provided to consumers. Therefore, an LMHA may reject proposals from external providers during procurement based on a determination that it can deliver the service at a lower cost, provided that the procurement instrument specifies the maximum allowable rate for which the LMHA will contract for the service. However, the maximum allowable rate must include all expenses related to providing the service.

The ability of the provider to work with other providers and community organizations to provide continuity of care and linkages to community-based support systems is addressed through the requirement that all services adhere to DSHS established standards of care, especially those defined in Chapter 412, Subchapter G, of this title, relating to Mental Health Community Services Standards, and the Resiliency and Disease Management system; this requirement applies to both LMHAs and external providers.

§412.756. Local Network Development Plan

Proposed §412.756, Local Network Development Plan, requires each LMHA to develop a local network development plan that reflects local needs and priorities and maximizes consumer choice and access to services. DSHS will establish a biennial schedule for submission of plans, which is consistent with the statutory requirement for DSHS to review an LMHA's status as a service provider every two years. In establishing the schedule, DSHS may require some LMHAs to submit plans earlier than others, to achieve a staggered review cycle and refinement of the tools and procedures used in the implementation. However, every LMHA will have at least 180 days to develop its plan.

LMHAs are currently required to develop local service area plans using established guidelines on an annual basis. The planning process required under this subchapter is not intended to be a separate activity completed in isolation of other planning efforts. DSHS will work closely with the Department of Aging and Disability Services to review existing planning guidelines and revise them to reflect current conditions, including the requirements of these proposed new rules. DSHS anticipates that, under revised guidelines, the local network development plan will become the primary component of the mental health portion of the local service area plan.

Under proposed subsection (c) the process used to develop the plan must ensure effective participation by stakeholders, including the LMHA's Planning and Network Advisory Committee. This ensures that the planning process required under this subchapter is integrated with existing planning efforts at the local level and includes substantial input from consumers and family members as well as other stakeholders.

Proposed subsection (d) states that DSHS will develop a list of interested providers for each local service area. DSHS will provide a website listing minimum RDM services requirements and, for each local service area, service capacity and funding information. Providers will have an opportunity to submit a description of their qualifications and experience and indicate their interest in providing services in each local service area; DSHS will post provider responses. This process is made available as a convenience to providers, who will be able to indicate their interest in various areas of the state through a single submission, and to LMHAs, who can use the information to help them determine whether or not procurement is feasible. The list cannot be viewed as a definitive measure of the number of willing and qualified external providers; that can only be determined through actual procurement or through further inquiry by an LMHA, as described below. However, it can indicate a general level of interest and provide LMHAs with a starting point for collecting additional information. The list is one source of information the LMHA will use to assess the potential for acquiring services through external providers. While the absence of providers indicating interest in a particular local service area may be the primary basis for an LMHA to conclude that procurement is not feasible, the presence of providers

indicating interest would not be considered conclusive evidence of a sufficient pool of interested providers to require procurement.

Proposed subsection (f) requires LMHAs to maximize dollars available to provide services and specifies strategies an LMHA must consider in doing this, including joint efforts with other local authorities on planning, administrative, purchasing and procurement, other authority functions, and service delivery activities. This language is consistent with legislative direction and recognizes that LMHAs may achieve economies of scale by working together. Some LMHAs are already engaged in such activities, but additional opportunities may be found as LMHAs expand their use of external providers. More extensive use of external providers will require development or strengthening of procurement, contracting, and oversight functions while at the same time decreasing activities and administrative functions related to direct service delivery. The proposed rule directs LMHAs to examine options for minimizing overhead and administrative costs and achieving purchasing efficiencies, which may include adoption of new business models and increased collaboration with other LMHAs.

The elements that must be included in a local network development plan are itemized in proposed subsection (g). These include a description of the planning processes and participants, projected service capacity, and baseline data showing the type and quantity of services provided by the LMHA and by external providers. DSHS will define how baselines are to be determined, which may involve information extracted from the DSHS data warehouse or supplemental inventories.

Proposed subsection (g)(5) requires the plan to include a summary of past inquiries received by the LMHA from external providers and the LMHA's response. This includes inquiries regarding traditional contracting arrangements as well as requests that the LMHA consider alternative proposals such as regional service delivery models covering more than one local service area.

According to proposed subsection (g)(6), the LMHA must present its assessment of the external provider market, and state whether or not it will assemble or expand its external provider network by service type and population served. The RDM model has multiple levels or packages of services for adults and for children/adolescents. External providers may or may not offer a comprehensive array of services, so procurement decisions must be made individually in relation to each service package for each population.

Proposed subsection (g)(7) requires the plan to include a clear rationale for the decisions regarding network assembly or expansion consistent with the LMHA's assessment of the external provider market. If the LMHA is currently providing a service, the presumptive expectation is that the LMHA will seek to establish or expand its external provider network through procurement. Under these circumstances, a decision not to procure the service must be based on one or more of the conditions listed in §412.758(a). These conditions include a determination that interested qualified providers are not available to provide services in the LMHA's service area. If the LMHA is not currently providing the service and has a network of external providers, the LMHA may or may not choose to initiate procurement. In this situation, a decision not to procure the service may be based on the rationale that the existing external provider network provides 100% of the service capacity and meets minimum standards of

consumer choice and access. However, the LMHA should consider, among other factors, the length of time since it last procured the service and the benefits of opening the network to introduce competition or to expand capacity, access, and/or consumer choice. If the plan includes service provision by the LMHA, the rationale must identify and support the volume of services that must be provided by the LMHA as required in §412.758(f).

Under proposed subsection (g)(8), if the LMHA decides to assemble or expand the external provider network, the network development plan must describe the LMHA's plans for procurement, including the services and combinations of services to be procured, the capacities to be procured, and the methods and timelines for procurement. An LMHA may "bundle" certain services for procurement so that a provider who wants to offer any one of the bundled services must offer all of them. This may be done for a number of reasons. For example, certain consumers may be expected to use multiple services, and having those services available from a single provider might enhance continuity of care. Also, it may not be economically advantageous to provide a specific service, and it might be necessary to combine that service with a more profitable one to attract external providers.

The description of procurement plans must also address steps and timelines for securing consumer choice decisions and transitioning consumers to new providers. According to procedures delineated in §412.760, Consumer Selection of Providers, the distribution of consumers across the provider network is consumer-driven. No provider is assured of receiving a minimum number of consumers or proportion of service capacity. Furthermore, the procedures allow for a gradual transition to facilitate clinically appropriate transfer planning and continuity of care for consumers moving from the LMHA as a provider to an external provider.

An estimate of the time needed for the LMHA to reestablish service volume lost should a contract be terminated must also be included in the description of procurement plans. The LMHA may use the estimated time required to reestablish lost service volume as a minimum notice period for contract termination by an external provider. While a contract provision does not guarantee that a provider will not abruptly terminate services, it does establish an expectation and a measure of what is necessary for a contacted external provider to leave the network in good standing. This timeframe is also relevant to determinations regarding the protection of critical infrastructure, as addressed in §412.758(a)(5).

Finally, procurement plans must state any additional qualifications that an LMHA will require of individual practitioners in addition to those described in the DSHS performance contract. This provision allows the LMHA to hold external individual practitioners to the same standard applied to the LMHA's employees.

Proposed subsections (g)(9) and (g)(10) require the local network development plan to include a description of how the LMHA will address consumer choice and access and must identify any services to be provided by a single provider due to economic factors that prevent an LMHA from offering consumers choice of more than one provider. For example, it may not be economically feasible to establish more than one Assertive Community Treatment team in a local service area. In some cases, a consumer might have a choice of individual practitioners within the team, but not a choice of teams.

Another element of the plan, required in proposed subsection (g)(11), is a description of how service dollars will be preserved while maintaining the LMHA's ability to continue performing authority functions and administrative services related to the authority functions. This description must include the LMHA's strategies for minimizing overhead and administrative costs and achieving purchasing efficiencies as required in subsection (f), which directs LMHAs to consider joint efforts with other LMHAs. Producing this section of the plan will require the LMHA to clearly identify administrative costs associated with service delivery versus those supporting authority functions. Moving from direct service delivery to a system in which the LMHA's primary role is assembly and maintenance of an external provider network will change the scope and nature of its activities. Under a direct service delivery model, the LMHAs may have achieved certain economies through shared administrative services that support both authority and service delivery functions. As an increasing proportion of services are contracted out, those economies may diminish and require alternative business models to avoid shifting dollars away from service delivery to support authority and related administrative functions.

Additional elements required in the plan in proposed subsections (g)(12)-(14) address cultural and linguistic diversity issues, past efforts to develop an external provider network, and a description of barriers to attracting new external providers and conditions that must be present to attract new external providers to the local services area, as well the LMHA's plans to address any identified barriers. While the LMHA does not have an obligation to create an artificial market through inflated rates or other financial incentives, it is expected to consider any reasonable steps that might be taken to attract new providers to the area. For example, if the LMHA is able to provide services in outlying areas because local government provides free space for service delivery on a part-time basis, securing permission for external providers under contract with the LMHA to have similar access to free space might be sufficient to attract external providers to an area that might otherwise be financially unsupportable. Reasonable steps might also include collaborating with neighboring LMHAs to create a regional service delivery system or to provide certain resource-intensive services on a regional basis. If identified barriers include existing agreements or circumstances identified by the LMHA pursuant to §412.758(a)(6), the LMHA must indicate whether it is possible to make modifications to expand opportunities for external provider participation. For example, an LMHA may have an agreement with city and county health departments through which the agencies share a single facility in a central location to provide "one-stop" healthcare services to the local community. While the written agreement may specify that the LMHA is to provide the mental health services, it may be possible to modify the agreement to allow mental health services to be provided by an external provider under contract with the LMHA.

Finally, proposed subsection (g)(15) requires the LMHA to describe its plans for network development for at least an additional two years. While this information does not need to be as detailed as the information presented for the two years covered by the plan, it should be sufficient to provide context and give a general indication of the scope and rate of development anticipated.

Proposed subsection (h) requires the LMHA to send its draft local network development plan to local consumer and advocacy groups and make it available to the public through its website and other accessible media, invite public comment, consider all comments received, and make any

revisions it deems appropriate in response to the public comment. The public comment required in the planning process is a critical element in the structure of the proposed subchapter. By requiring a period of public comment on the LMHA's draft plan, all stakeholders have an opportunity to review the plan, identify any elements that might be inconsistent with the provisions of this subchapter, and suggest changes reflecting their interests. Specific notice to consumer and advocacy groups ensures that key stakeholders are aware of the plans publication and can exercise their rights to review and provide comment. While the LMHA is not required to accept every comment and make corresponding changes to its plan, rejection of a comment does obligate the LMHA to articulate a reasoned justification for its decision that will be subject to review by DSHS.

Proposed subsection (i) requires the LMHA to submit its proposed local network development plan to DSHS together with a summary of the comments it has received and the LMHA's response to the comments. If the LMHA has made revisions to its plan, it must update its website with the revised version.

Proposed subsection (j) describes DSHS' review of local network development plans. DSHS will review the content of the plan to evaluate the LMHA's level of effort, its rationale for decisions and plans, and the extent to which it has implemented previous plans and made progress towards assembly of an external provider network. Particular attention will be given to stakeholder comments and the LMHA's responses to those comments. DSHS may request additional information from the LMHA if the initial submission does not provide sufficient information for DSHS to complete its evaluation.

The diversity of circumstances across the state precludes application of a single standard, so review of local plans will be conducted with consideration to the specific context of the local service area. For example, rural and frontier counties may not have a sufficient population base to attract external providers, and in those areas it is reasonable to expect that the LMHA may continue to be the primary or only provider of mental health services for the foreseeable future. However, as noted previously, these LMHAs are still required to identify and address the barriers to assembly of an external provider network, such as exploring alternative service models and other arrangements that might attract external providers to the area. In urban areas, the opportunities for and supply of external providers will be far greater, facilitating more extensive and rapid expansion of external provider networks. An LMHA in an urban area that does not demonstrate significant progress in assembling an external provider network will be subject to close examination by DSHS. While there may be legitimate circumstances and barriers that fall under a condition articulated in §412.758(a), the LMHA will be expected to provide clear, documented evidence justifying the condition.

DSHS will establish a mechanism for stakeholder involvement in the review process. This mechanism will not be restricted to passive receipt of comments but will provide an opportunity for stakeholders to have meaningful input during the review process. To ensure stakeholder input is not restricted to organizations and individuals represented in Austin, DSHS will explore use of teleconferencing and other available technology to facilitate interaction with stakeholders at both the state and local level.

If DSHS, with input from stakeholders, determines that an LMHA's local network development plan demonstrates the LMHA is in compliance with this subchapter and is making reasonable attempts to develop an external provider network, it will approve the plan. To ensure timely review, the rule specifies that DSHS will approve an acceptable plan within 60 days of receipt. If the plan is deemed to be unacceptable, DSHS will require the LMHA to revise the plan prior to approval; final approval of a plan requiring revisions is not required to be completed within the 60-day time frame.

Under proposed subsection (k), LMHAs are required to update public postings with their approved network development plans. To promote widespread accessibility, proposed subsection (l) states that DSHS will have mechanism on its website linking to each of the LMHA websites so that stakeholders can access all approved local plans through a single portal.

Proposed subsection (m) anticipates that the results of procurement are unpredictable and may not conform to an LMHA's local network development plan. For example, the plan may state that the LMHA will contract with external providers for all services, but the procurement may fail to elicit responses from qualified external providers for certain services. In such cases, the LMHA must submit a plan amendment to DSHS and update all electronic or print copies of the plan that it has publicly posted, after receiving approval of the amendment from DSHS.

§412.758. LMHA Provider Status

Proposed §412.758, LMHA Provider Status, addresses the LMHA's status as a provider of services. Tex. Health and Safety Code §533.035(e) states that an LMHA may serve as a provider of services only as a provider of last resort, and only if the LMHA demonstrates to DSHS that (1) it has made every reasonable attempt to solicit the development of an available and appropriate provider base that is sufficient to meet the needs of consumers in its service area, and (2) there is not a willing provider of the relevant services in the authority's service area or in a portion of the area where the provision of the services is needed. Proposed subsection (a), which sets out the conditions under which an LMHA is authorized to be a provider of services, outlines the circumstances under which an LMHA can meet these statutory criteria. These conditions constitute the sole basis for justifying continued service provision; an LMHA may not rely on other factors to justify maintaining its status as a service provider. In making the determination, each service package for adults and children/adolescents must be considered separately. An LMHA's authority to provide services under any of these conditions is limited to the two-year period covered by the local network development plan.

Proposed subsection (a)(1) states that an LMHA may provide services if it determines that interested qualified providers are not available in the local service areas or that no providers met procurement specifications. While procurement is the only method through which an LMHA can positively determine that a provider is qualified, information showing that a provider is not qualified may be available before a decision is made whether or not to initiate procurement. Under §412.756(d), providers have an opportunity to submit a description of their qualifications and experience to be posted on the DSHS list of interested providers. That information alone may be sufficient to establish that a provider lacks the necessary qualifications. For example, a provider with insufficiently credentialed staff and no history of providing mental health services similar to those defined in the RDM services packages is clearly not qualified. This condition

may also exist based on the results of procurement when no qualified providers respond or when qualified providers fail to meet additional minimum requirements of the procurement. For example, a qualified provider may propose to provide services at a rate that exceeds the maximum rate specified in an RFP, or may have a clearly documented history of noncompliance.

Proposed subsection (a)(2) allows an LMHA to provide services in order to offer consumers a minimum level of consumer choice. A minimal level of consumer choice is present when consumers can choose from two or more qualified provider organizations in the LMHA's provider network for service package and from two or more qualified individual practitioners in the LMHA's provider network for specific services within a service package. Therefore, an LMHA may continue to provide services if there is only one external provider, even when that provider is able to meet 100 percent of service capacity. Consumer choice is limited to providers within the LMHA's network at any given time; consumer preference does not require specific providers to be included or maintained in the network so that consumers can choose a particular provider. Furthermore, consumer choice may be limited by availability. Because a network has limited capacity, there may be times when only one provider is able to accept new clients. These limitations on consumer choice are consistent with industry standards for both public and private healthcare networks.

Proposed subsection (a)(3) addresses situations in which external providers are unable to offer access to services that is equivalent to or better than access provided by the LMHA. Access has multiple components, including timeliness and geographic proximity. DSHS has established standards for timeliness that are applicable to all providers, but equivalent standards do not exist for geographic proximity. Services should be located so that the greatest number of consumers can reach the service site without undue hardship. This issue is particularly critical in service areas with rural and frontier counties, where service sites must be strategically located to maximize consumer access. After procurement, an LMHA may find that the proposed service locations force a significantly greater number of consumers to travel long distances in order to access services, which would justify the LMHA continuing to provide services. When making this determination, the LMHA should consider all service sites proposed by a potential provider, including sites borrowed from another entity on a full time or part time basis, as well any alternative service model, such as telemedicine, proposed by a respondent. An LMHA relying on this condition must submit geographical access information to DSHS for verification. DSHS will measure access by using the latest healthcare access technology available to the agency, such as geomapping, thus providing an objective means of comparing the level of geographic access offered by various network configurations with and without participation by the LMHA. A provider's hours of operation may also relate to consumer access to services. However, because it may be more difficult to objectively measure a provider's hours of operation in comparison to those of an LMHA, this factor would be more appropriately addressed by the LMHA as a minimum requirement in any procurement document it issues.

Proposed subsection (a)(4) recognizes that an LMHA may be unable to procure sufficient volume to meet 100 percent of the service capacity. In those cases, the LMHA may provide the balance of the service capacity. When necessary, section (f) allows the LMHA to reduce the volume of services provided through contract so that it can retain a sufficient volume of services to be financially viable.

Proposed subsection (a)(5) allows an LMHA to provide services when necessary to protect critical infrastructure to ensure continuous provision of services. Specifically, this condition permits the LMHA to implement a phased transition to an external provider network by procuring an increasing proportion of service capacity over a period of time defined by the LMHA. At the end of this transition period, the LMHA must give up its role as a service provider if it determines that qualified external providers are willing and able to provide sufficient added service volume within the timeframe specified by the LMHA in its local network development plan.

Critical infrastructure is protected when external providers can be relied upon to provide the 100 percent of the service capacity indefinitely without significant disruption. This includes the willingness and ability of external providers to provide sufficient added service volume in a timely manner (defined by the LMHA in its network development plan) if one or more providers leave the network. This may be achieved by existing providers increasing their service volume or through emergency procurement of additional providers. The ability to determine not only the proportion of services to be procured for each two-year period, but also the timeframe over which the transition to an external provider network will occur, enables the LMHA to verify the reliability of the external provider network and the greater external provider market. Reliability may be judged through experience or through an assessment of relevant factors such as current providers' infrastructure, past performance, and expressed willingness to provide additional service volume, as well as the market response to past procurements.

Proposed subsection (a)(6) encompasses situations in which existing agreements impose restrictions on an LMHA's ability to contract with external providers or existing circumstances would result in the loss of a substantial source of revenue that supports service delivery if the LMHA did not provide services; specific examples are provided. Substantial revenue is an amount that would support a material volume of client services. These provisions apply to agreements regarding in-kind contributions, such as utilization of a building, as well as direct financial assistance.

The existence of such agreements or circumstances does not allow an LMHA to remain in the role of service provider for an indefinite period of time. A separate determination must be made in each two-year planning cycle, and the LMHA is expected to investigate options for modifying the agreements or circumstances to allow participation by external providers. Examples include an agreement requiring direct service provision by the LMHA that might be amended to allow subcontracting, and a building owned by the LMHA that may be sold or leased over time. The rule recognizes that funders and other contractual partners may not allow such modifications, but the LMHA is obligated to explore the possibility.

Subsection (b) authorizes an LMHA to provide services during the two-year period if it determines, based on the rationale provided in its approved local network development plan, that it will not assemble or expand the external provider network because of one or more of the conditions identified in subsection (a). If the condition(s) apply to only certain services, the authorization is limited to those specific services.

Subsection (c) states that an LMHA is not authorized to provide services during the two-year period covered by an approved local network development plan if it determines, based on the rationale provided in its approved plan, that it will not assemble or expand the external provider network because its current network of external providers delivers 100 percent of the service capacity and meets levels of consumer choice and access specified in §412.758(a)(2) and (3), relating to LMHA Provider Status.

Subsection (d) recognizes that an LMHA's status as a provider cannot be definitively determined prior to a planned procurement; the decision must be based on the results of the procurement as well as the approved local network development plan. If the results of the procurement are not consistent with the LMHA's intended status as a provider described in the approved plan, the LMHA must submit a plan amendment to DSHS for approval.

Subsection (e) clarifies that an LMHA is not required to breach existing contracts or to lose or forego substantial revenue that supports the provision of services in order comply with the provisions of this subchapter. LMHAs are required to give prospective funders information about the intent and requirements of this subchapter and are prohibited from conditioning receipt of funds upon direct service provision by the LMHA. The rule does, however, recognize that funders have the right to make policy decisions regarding use of their funds. If a funder receives the information about the state's intent for LMHAs to establish external provider networks and still chooses to require direct service provision by the LMHA, the LMHA is permitted to accept the funds. Also, the restrictions of subsection (e) do not apply to grants, gifts, or other funding sources that do not involve the use of "department federal or department state funds" disbursed to an LMHA by DSHS.

Subsection (f) applies when the LMHA provides services under one or more of the conditions in subsection (a). In such situations, the LMHA must identify the proportion of service capacity that it must provide in order to make service provision financially viable and provide the rationale for the decision. For example, an LMHA may be able to procure only 95 percent of the service capacity for a given service. Under subsection (a)(4), the LMHA would be authorized to provide services. However, the LMHA may find that it is not financially viable to provide only five percent of the service capacity. An example of this would be if the scope of the LMHA's direct service delivery would be reduced to the extent that certain staff or other resources must be retained in order to provide the service but the low volume of service results in idle capacity. Under such circumstances, the LMHA may calculate the proportion of service capacity necessary to fully utilize its resources and reduce the service capacity allowed from external providers by a commensurate amount.

§412.760. Consumer Selection of Providers

Proposed §412.760 describes the process that will be used by LMHAs to provide consumers and legally authorized representatives with the information and opportunities necessary to exercise consumer choice.

Subsection (a) requires the LMHA to maintain a list with the most current information available about each provider in its network, including the provider's name, service locations, contact information, website address, and languages in which services are available. If the LMHA is a

provider of services, the list must include the same information for the LMHA provider as for external providers. The number of required elements has been minimized, including the exclusion of items subject to frequent change, to promote maintenance of accurate and current information that can be presented in a simple, easy-to-use format. The list is intended to be an objective source of comparable information about each provider, including how a consumer can obtain more detailed information. The LMHA is required to post the list on its website and distribute it at least annually to local consumer and advocacy groups.

Providers are free to engage in additional consumer and stakeholder education efforts using their own resources, but the LMHA is not required to distribute brochures or other materials supplied by external providers. The role of the LMHA is to provide consumers with accurate and consistent information about providers so that no provider is advantaged in the official presentation of information; each provider is responsible for its own marketing.

Subsection (b) requires the LMHA to provide forums through which providers can present information to consumers and other stakeholders. Such forums might include presentations at advocacy group meetings, open houses, or participation in community health fairs. These forums are intended to provide consumers and stakeholders with more in-depth information and an opportunity to ask questions of various providers.

Under subsection (b), LMHAs have defined but limited responsibilities for providing consumers and other stakeholders with information about providers consistent with the level of resources available to the LMHA to perform authority functions, including consumer education. The requirement to distribute the provider list to consumer and advocacy groups is based on the expectation that these groups will play an active role in disseminating consumer information and providing consumers with support and assistance.

Subsection (c) describes the process through which consumers select their providers. The LMHA is required to provide consumers and legally authorized representatives with a copy of the provider list. New consumers receive this information after the LMHA conducts an assessment and recommends services based on the results of the assessment. The LMHA is also required to provide a description of the array of service options for which the consumer may be authorized. In describing the array of service options available to the consumer, the LMHA is expected to offer or allow a consumer to choose only some of the services for which the consumer may be authorized; a consumer is not required to accept all services for which he or she may be authorized.

The LMHA must provide the consumer or legally authorized representative with the list of providers offering services for which the consumer may be authorized and inform them that they have the right to choose from among available providers and may change providers. The LMHA must make a telephone and appropriate space available for consumers to use in selecting a provider. This is to support consumers in making an informed and timely selection and to facilitate linking the consumer with the chosen provider. If the consumer does not wish to choose a provider at the time of the assessment, the LMHA must give consumers a reasonable period of time to make a decision and cannot demand that a selection be made on site.

If the consumer does not make a selection within the designated time frame, the LMHA shall assign a provider with assignment rotating equally among all available providers. Available providers are those offering the required service who have sufficient capacity to accept new clients. Consumers are not required to contact the LMHA stating their choice of provider; they may indicate choice by contacting a provider directly. An LMHA can identify consumers who have not selected a provider within the designated time frame by generating a list from the CARE system of clients who have been assessed but for whom no subsequent service authorization has been requested.

All consumers and legally authorized representatives shall be given the current provider list and be offered the option of choosing a different provider at every scheduled treatment plan review. This is a mechanism through which consumers can learn about new providers and be reminded that the option to change providers remains available. Consumers are allowed to change providers at any time subject to approval by the LMHA. The rule does not restrict the frequency with which a consumer may change providers, but the LMHA may impose some restrictions based on the clinical appropriateness of the request within the context of the utilization management authorization process. Excessive movement from one provider to another may not be in the best interest of the consumer and may indicate the need for clinical intervention. Consumers may request a review of LMHA decisions under the existing notification and appeals process described in §401.464 of this title.

LMHAs are required to maintain documentation of the consumer's or legally authorized representative's provider selection. This includes documentation at every scheduled treatment plan evaluation as required in subsection (c)(6) of this section.

§412.762. Procurement Principles

Proposed §412.762, related to Procurement Principles, describes standards that govern all procurement activities undertaken by the LMHA in assembling and expanding an external provider network.

Proposed subsection (a) requires an LMHA to comply with applicable rules and statutes and clarifies that an LMHA may procure mental health services required by the DSHS performance contract and the LMHA's approved local network development plan by any procurement method allowed by applicable statutes and rules that provides the best value to the LMHA.

This subchapter includes procedures for two methods that are likely to be used extensively in the procurement of mental health services by an LMHA: Request for Proposal and Open Enrollment. An alternative competitive procurement method is informal solicitation, which may be used to competitively procure services when the contract amount will not exceed $25,000. Certain non-competitive procurement methods may be used in situations described in §412.59 of this title (relating to Non-competitive Procurement of Community Services). These include sole source procurement, which may be used when the services are proprietary to a single source or only one source can or is willing to provide the service; procurement from a governmental entity; emergency procurement, which may be used in an emergency situation in which a delay may result in harm to a consumer; procurement of services for less than $5,000; and procurement following an unsuccessful competitive procurement process. These processes are not

specifically addressed in the proposed subchapter because it is anticipated that their use will be relatively rare in the purchase of mental health services.

The list of relevant factors used in determining best value in proposed subsection (b) is a compilation of factors from the Texas Health and Safety Code, §533.016(c) and §534.055(f), which an LMHA considers when determining best value. Minor changes have been made to eliminate redundancy and wording applicable only to goods rather than services.

§412.764. Request for Proposals

Proposed §412.764 describes procedures for competitive procurement using the request for proposal (RFP) method.

Under proposed paragraph (1) LMHAs choosing the RFP procurement method are responsible for developing a draft RFP to ensure public input. The proposed rule requires the draft RFP to include all elements required by applicable statutes, rules, and procurement standards as well as other elements related to transitioning to external providers and providing for consumer needs.

In the local network development plan required under proposed §412.756, Local network development plan, LMHAs must specify steps and timelines for transitioning consumers to new providers. These goals must be included in the draft RFP to inform potential respondents about the processes through which consumers will select a provider and, when applicable, transition to a new provider. In responding to the RFP, respondents are required to describe how they intend to implement those transition goals. If the LMHA expects external providers to consider or give hiring preference to LMHA employees who will lose their jobs as a result of procurement, this must be stated in the RFP.

The draft RFP requires respondents to describe how they will involve consumers, legally authorized representatives, and families at the policy and practice level. A key goal underlying the provisions of this subchapter is to empower consumers, their legally authorized representatives, and family members and promote their active involvement in the development of the mental health service system as well as their individual treatment and recovery. Providers may address this requirement by establishing special consumer advisory, planning, and review committees or by appointing consumers to such committees; utilizing consumers in staff orientation and training; involving consumers in the development of information given to consumers, staff, and members of the public; formalizing processes to solicit and respond to consumer comments and suggestions; and establishing other mechanisms through which consumers can contribute to the development and/or review of organizational policies and practices. The rule does not require responders to use a particular process or to implement suggestions received from consumers.

Respondents will also be required to specify where and when services will be provided within the LMHA's local service area. Services locations and hours of operation are important components of consumer access that must be considered in the assembly of a provider network. If the post-procurement network reduces consumer access to services, §412.758, LMHA Provider Status, allows the LMHA to provide services as part of the provider network. Sites

identified by respondents in their proposals will be the basis for making this determination and may be submitted to DSHS.

An additional element that an LMHA must include in its draft RFP is the maximum allowable rate for the services being procured if the LMHA intends to reject any proposal with a rate exceeding that amount.

Proposed paragraph (2) requires the LMHA to publicize the draft RFP, solicit public comment, and invite potential providers to describe the challenges in providing services in the LMHA's local service area. In addition to posting the draft RFP on state and local websites, the LMHA is required to send the draft RFP to interested providers and local consumer and advocacy organizations. Interested providers include those who have contacted the LMHA and those identified through the DSHS website referenced in §412.756(d). This ensures that known stakeholders most impacted by the results of procurement are aware that the draft RFP is available for review. Publication of the draft RFP also provides an avenue for soliciting more general feedback from potential providers about barriers and challenges in providing services; this information may be useful to the LMHA in developing subsequent local network development plans.

The development and publication of a draft RFP allows potential respondents and other stakeholders to review the content and evaluate whether the proposed specifications are consistent with the requirements of this subchapter and encourage assembly and expansion of an external provider network. It also establishes a way for stakeholders to challenge specific provisions and suggest revisions to the draft RFP, which may result in a more successful procurement and reduce subsequent challenges and protests.

Proposed paragraph (3) requires the LMHA to consider all public comment it receives in developing the final RFP and lists additional elements that must be included. Proposed paragraphs (4) and (6) through (11) describe additional requirements for conducting a procurement using the RFP method. Proposed paragraph (7) permits minor changes to be made to the final RFP by the LMHA provided that everyone who has already obtained the final RFP is notified of the changes and is provided equal opportunity to respond. This provision is intended to allow for corrections or clarifications to be made to the final RFP; however, it would not allow changes such as a modification to the type(s) or volume of services to be procured or the maximum allowable rate for the services to be procured, which are considered more substantive in nature and would require the LMHA to re-publish the amended RFP as a draft RFP to ensure public input on the LMHA's new or amended requirements. Requirements related to developing and publishing an RFP Notice and making an award come from §412.58(2)(B)(i) and (2)(C) of this title (relating to Competitive Procurement Methods for Community Services), which currently applies to LMHAs.

Proposed paragraph (5) clarifies that an LMHA may not submit a proposal in response to its own RFP. The procurement process is used to make comparison among external respondents. The only mechanism in the RFP process for a comparison between the LMHA as a provider and an external provider is in the development of minimum specifications or requirements, which may reflect specific aspects of the LMHA's service delivery, such as hours of service or price.

§412.766. Open Enrollment

Proposed §412.766 describes procedures for procurement using the open enrollment method.

Under proposed paragraph (1) LMHAs choosing the open enrollment procurement method are responsible for developing a draft request for applications (RFA) to ensure public input. The proposed rule requires the draft RFA to include all elements required by applicable statutes, rules, and procurement standards as well as other elements related to transitioning to external providers and providing for consumer needs.

A critical element in the RFA is the rate of payment for the services that an applicant must agree to accept. The LMHA is responsible for including in the RFA the method it used to determine that rate of payment.

The LMHA must include in the draft RFA a detailed description of the LMHA's minimum requirements for a provider of the services to be procured. These minimum requirements must include requirements related to the cultural and linguistic needs of the consumers in the LMHA's local service area; the involvement of consumers, legally authorized representatives, and families at the policy and practice levels within the applicant's organization or individual practice; transition goals for LMHA employees, if applicable; transition plan for consumers; and location and hours of services. Additionally, the draft RFA requires the applicant to include information demonstrating how the applicant will meet the minimum requirements.

Proposed paragraph (2) requires the LMHA to publicize the draft RFA, solicit public comment, and invite potential providers to describe the challenges in providing services in the LMHA's local service area. In addition to posting the draft RFA on state and local websites, the LMHA is required to send the draft RFA to interested providers and local consumer and advocacy organizations. Interested providers include those who have contacted the LMHA and those identified through the DSHS website referenced in §412.756(d). This ensures that known stakeholders most impacted by the results of procurement are aware that the draft RFA is available for review. Publication of the draft RFA also provides a mechanism for soliciting more general feedback from potential providers about barriers and challenges in providing services; this information may be useful to the LMHA in developing subsequent local network development plans.

The development and publication of a draft RFA allows potential respondents and other stakeholders to review the content and evaluate whether the proposed specifications are consistent with the requirements of this subchapter and encourage assembly and expansion of an external provider network. It also establishes a way for stakeholders to challenge specific provisions and suggest revisions to the draft RFA, which may result in a more successful procurement and reduce subsequent challenges and protests.

Proposed paragraph (3) requires the LMHA to consider all public comment it receives in developing the final RFA and lists additional elements that must be included. Proposed paragraphs (4), (6), (7), and (8) describe additional requirements for conducting a procurement using the open enrollment method. Most provisions related to developing and publishing an RFA Notice and making an award come from §412.60(b)(1) and (c) of this title (relating to Competitive Procurement Methods for Community Services), which currently applies to LMHAs.

Proposed paragraph (5) clarifies that an LMHA may not submit an application in response to its own RFA. Proposed paragraph (9) states that for every service procured through open enrollment after the effective date of this subchapter, the LMHA must, at least every two years procure the service using the same RFA developed in accordance with paragraphs (1)-(3); procure the service using another RFA developed in accordance with paragraphs (1)-(3); or procure the service using another procurement method.

FISCAL NOTE

Machelle Pharr, Chief Fiscal Officer, has determined the following fiscal impact as a result of enforcing or administering the proposed rules for the first five-year period the proposed rules are in effect. There are no foreseeable implications relating to costs or revenues to state government as a result of administering or enforcing the proposed rules. DSHS will have to reallocate existing resources to provide for certain new responsibilities associated with administering the proposed rules. These new functions include provision of technical assistance to LMHAs and reviewing the local network development plans required by the rules; development of training materials for distribution and presentation to LMHA staff and local stakeholders, including providers, consumers, and advocacy groups; and development of a submission and review schedule that prevents all local network development plans from coming due for review at the same time. Enforcement of the rules will be handled through the existing mechanisms provided in the DSHS performance contract with LMHAs based on the results of any reviews or complaints received by DSHS from local stakeholders.

There will be an increase in some costs, and decreases in other costs incurred by LMHAs, which are local governments, as a result of administering the rules as proposed. The additional costs and cost reductions experienced by each LMHA are difficult to quantify since each LMHA has unique processes and organizational and administrative structures.

Each LMHA is currently responsible for developing a local service area plan for mental health services. The proposed rules require a local network development plan, which DSHS anticipates will become the primary component of the local service area plan for mental health services. The local network development plan may result in increased procurement and contract management costs to LMHAs as they assemble and expand their provider networks to include a greater number of external providers. This will be true for some LMHAs, but not all, depending upon the extent to which external providers are available and qualified to contract for services and the degree to which each LMHA is currently structured to manage a diverse provider network.

Cost reductions for LMHAs are also anticipated as infrastructure to support LMHA-provided mental health services is reduced due to expansion of the external provider network. Through the local planning process, the LMHA is allowed by the proposed rules to create a timetable for shifting the provision of services to external providers in a manner that does not jeopardize critical infrastructure. The LMHA will be able to make adjustments to its organizational and administrative structures to balance costs and cost offsets.

Local network development plans will be unique to each LMHA based on local community circumstances, therefore, estimating costs and cost offsets for the LMHAs are not possible at this time. Aside from the cost implications for LMHAs discussed above, there are no foreseeable cost implications for local governments.

Revenues to local governments are not expected to change due to the proposed rules. The proposed rules do not change the allocation methodology or amount planned for each LMHA. Earned revenue is also not expected to change; however, payments to providers are likely to shift from the LMHA as a provider to external providers under contract with the LMHA.

There is no foreseeable fiscal impact to local government as a result of enforcing the rules as proposed, because local governments do not have regulatory authority with respect to this rule. DSHS has the regulatory responsibility for enforcement of the rules.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

The proposed rules have the potential to both eliminate and create opportunities for small businesses or micro-businesses to become involved in providing mental health services funded by DSHS. Certain providers that are small businesses or micro-businesses may be impacted by the proposed rules. The increased competition resulting from implementation of the rules may cause certain small businesses or micro-businesses to lose contracts or a portion of the current business they currently have with an LMHA. In the aggregate, however, it is likely that the provider community, including providers that are small businesses or micro-businesses, will benefit from the increased oportunities resulting from the increased procurement of services by the LMHAs that will result from implementation of these rules.

While DSHS does anticipate a potential adverse economic effect on certain providers that are small or micro-businesses as a result of the proposed rules, this will not be a result of any costs of compliance with the rules, as the rules do not impose any requirements on providers. Instead, any adverse economic effect on providers that are small businesses or micro-businesses will be a result of the increased competition among providers of mental health services seeking to contract with LMHAs that are either assembling or expanding their network of providers in compliance with the new rules. It is not feasible to reduce this potentially adverse economic effect without undermining the express purposes of Texas Health and Safety Code §533.035(e): to require LMHAs to serve as a provider of services only as a provider of last resort and demonstrate to DSHS that it has made every reasonable attempt to solicit the development of an available provider base that is sufficient to meet the needs of consumers in its service area. The resulting increased competition among providers seeking to contract with the LMHA inevitably creates a potential for adverse economic effect on those providers who are not successful in contracting with the LMHA. This may occur with respect to any provider, whether or not the provider is a small business or a micro-business; nevertheless, the potential exists for providers that are small and micro-businesses.

PUBLIC BENEFIT

Joe Vesowate, Assistant Commissioner of Mental Health and Substance Abuse Services, has determined that for each year of the first five-year period the proposed rules are in effect, the public benefits anticipated include increased consumer choice of providers, increased competition to provide the best value to local communities and state government, and a transparent process for stakeholders to participate in the development of a local network development plan and ultimately a network of mental health providers that is uniquely suited to the needs of each local community. Mental health services in each community are expected to at least stay the same and are likely to increase in quantity and quality.

REGULATORY ANALYSIS

DSHS has determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

DSHS has determined that the proposed new rules do not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, do not constitute a taking under Government Code, §2007.043.

PUBLIC COMMENT

Comments on the proposal may be submitted to _____ or by email to _____. Comments will be accepted for 30 days following publication of the proposal in the Texas Register.

PUBLIC HEARING

A public hearing to receive comments on the proposal is scheduled for ____ at ___ a.m. at the Department of State Health Services, Room _____, Austin, Texas 78756.

LEGAL CERTIFICATION

The Department of State Health Services, General Counsel, Cathy Campbell, certifies that the proposed rules have been reviewed by legal counsel and found to be within the state agencies' authority to adopt.

STATUTORY AUTHORITY

The proposed new sections are authorized by Health and Safety Code, §533.035(a), which requires the Executive Commissioner to designate a LMHA in one or more local service areas; §533.035(b), which authorizes DSHS to disburse to LMHAs funds to be spent in the local service area for community mental health services and chemical dependency services for persons who are dually diagnosed as having both chemical dependency and mental illness; §533.035(c) which requires LMHAs to use the funds received from DSHS to ensure that mental health services are provided in the local service area; §533.035(d), which requires LMHAs to consider public input, ultimate cost-benefit, and client care issues to ensure consumer choice and the best use of public money in assembling a network of service providers and making recommendations relating to the most appropriate and available treatment alternatives for individuals in need of mental health services; §533.035(e), which requires an LMHA to serve as a provider of services only as a provider of last resort and only if the LMHA demonstrates to DSHS that the LMHA has made every reasonable attempt to solicit the development of an available and appropriate provider base that is sufficient to meet the needs of consumers in its service area and there is not a willing provider of the relevant services in the LMHA's service area or in the county where the provision of the services is needed; and §533.035(f), which requires DSHS to review the appropriateness of a LMHA's status as a service provider at least biennially. The proposed new sections are also authorized by Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by DSHS and for the administration of Chapter 1001, Health and Safety Code.

The proposed new sections affect the Health and Safety Code, Chapters 533, and 1001; and Government Code, Chapter 531.

Legend: (Proposed New Rule)
Regular Print = Proposed new language

§412.751. Purpose.

The purpose of this subchapter is to establish the process for a local mental health authority (LMHA) to assemble and maintain a network of service providers as required by Texas Health and Safety Code §533.035(b) - (f).

§412.752. Application.

This subchapter applies to local mental health authorities (LMHAs) and their use of funds disbursed to them by the Department of State Health Services (DSHS) pursuant to Texas Health and Safety Code §533.035(b).

§412.753. Definitions.

The following words and terms, when used in this subchapter, have the following meanings, unless the context clearly indicates otherwise.

(1) Consumer -- A person seeking or receiving mental health services through a local mental health authority (LMHA).

(2) DSHS -- The Texas Department of State Health Services.

(3) DSHS performance contract -- The performance contract between DSHS and an LMHA that is in effect at the time of an action required under this subchapter.

(4) External provider -- An organization that provides mental health services that is not an LMHA, or an individual who provides mental health services who is not an employee of an LMHA.

(5) Legally authorized representative -- A person authorized by law to act on behalf of an individual with regard to a matter described in this subchapter, and who may be a parent, guardian, or managing conservator of a child or adolescent, or a guardian of an adult.

(6) Local mental health authority (LMHA) -- An entity designated as a local mental health authority in accordance with Texas Health and Safety Code §533.035(a).

(7) Local service area -- A geographic area composed of one or more Texas counties delimiting the population which may receive mental health services through a local mental health authority.

(8) Provider -- Also known as a service provider, an organization or individual who delivers mental health services.

(9) Qualified provider -- A provider that is:

(A) an individual practitioner with the minimum qualifications required by the DSHS performance contract and an LMHA's approved local network development plan; or

(B) an organization that demonstrates the ability to provide services in accordance with the requirements of the DSHS performance contract.

(10) Request for Application (RFA) – A written request for applications concerning services the LMHA intends to acquire non-competitively (i.e., every applicant who meets the requirements specified in the RFA is awarded a contract).

(11) Request for Proposal (RFP) – A written request for proposals the LMHA intends to acquire competitively (i.e., proposals are compared and one or more may be chosen for award).

(12) Service capacity – The estimated number of adults or children/adolescents served, or to be served, for each Resiliency and Disease Management service package.

(13) Stakeholders -- Persons and organizations that have an interest in or who may be impacted by implementation and consequences of this subchapter, including current and former consumers; individuals eligible for mental health services through an LMHA; family members; advocacy organizations; providers; educational, social service, and other community organizations; public agencies responsible for appointing members of an LMHA's governing board; other local officials; and interested citizens.

§412.754. Establishment of a Provider Network.

Each LMHA shall assemble and maintain a network of service providers that are qualified to provide mental health services as necessary to meet the requirements of the DSHS performance contract. In assembling the network, the LMHA shall consider public input, ultimate cost benefit, and client care issues to ensure consumer choice and best use of public money and shall comply with the requirements of this subchapter.

§412.756. Local Network Development Plan.

(a) Requirement to develop a plan. Each LMHA shall develop a local network development plan to guide the configuration and development of the LMHA's provider network. The plan shall reflect local needs and priorities and shall be designed to maximize consumer choice and consumer access to services provided by qualified providers.

(b) Schedule for plan submission. DSHS will establish a schedule for biennial submission of local network development plans that allows each LMHA at least 180 days to develop its plan.

(c) Community involvement. The LMHA's planning process shall incorporate the diversity of opinion, culture, and ethnicity of the local service area and shall ensure:

(1) active involvement of the LMHA's Planning and Network Advisory Committee; and

(2) effective participation of stakeholders.

(d) State list of interested providers. DSHS will develop a list of interested providers for each local service area.

(1) DSHS will post minimum service requirements and the service capacity information for each local service area on its website and provide a mechanism for provider response. Service capacity information will include:

(A) the overall service targets for the number of adults and children/adolescents to be served listed in the current DSHS performance contract;

(B) the current state funding allocation for the LMHA; and

(C) the number of adults and children/adolescents served in each Resiliency and Disease Management (RDM) service package for the previous fiscal year and for the current year through the most recent closed quarter.

(2) Providers may submit a description of their qualifications, including their experience as it relates to the same or similar services and populations defined in the RDM service packages, and indicate their interest in providing services in each local service area.

(3) Information submitted by interested providers will be posted on the DSHS website. This list will be available to inform procurement decisions made by LMHAs, but shall not be construed as conclusive evidence of the existence of interested qualified providers for purposes of determining that procurement is required.

(e) Assessment of network expansion. The LMHA shall assess the potential for securing external providers for the LMHA's network by using available information, including the state list of interested providers.

(f) Strategies to maximize dollars available to provide services. The LMHA shall maximize dollars available to provide services by minimizing overhead and administrative costs and achieving purchasing efficiencies. Strategies that an LMHA shall consider in achieving this objective include joint efforts with other local authorities on planning, administrative, purchasing and procurement, other authority functions, and service delivery activities.

(g) Plan content. The LMHA's local network development plan shall include the following components.

(1) A description of the process used to identify and obtain information from stakeholders and the results of community involvement.

(2) A list of the organizations and numbers of individuals by category (e.g., consumers, family members, interested citizens) who participated in the planning process.

(3) The LMHA's projected service capacity for each RDM service package based on service data from the previous fiscal year and the current year through the most recent closed quarter for services controlled by the DSHS performance contract.

(4) Baseline data, as defined by DSHS, showing the type and quantity of services provided by the LMHA and by external providers.

(5) A summary of any written inquiries received by the LMHA from external providers interested in contracting with the LMHA and the LMHA's response.

(6) An assessment of the availability of current and potential external providers, and a decision whether or not to assemble or expand an external provider network by service type and population served.

(7) Rationale for the decision whether or not to assemble or expand the external provider network.

(A) If only selected services are included in plans for network assembly or expansion, the rationale shall address each service type and population served.

(B) The rationale for a decision not to assemble or expand the external provider network shall be based on one or more of the conditions identified in §412.758(a) of this title (relating to LMHA Provider Status) or on a determination that the current network of external providers serves 100 percent of the service capacity and meets levels of consumer choice and access specified in §412.758(a)(2) and (3) of this title (relating to LMHA Provider Status).

(C) If the plan includes service provision by the LMHA, the rationale shall specify and support the volume necessary to make provision of services by the LMHA financially viable as required by §412.758(f) of this title.

(8) When the decision is to assemble or expand the external provider network, a description of the LMHA's plans for procurement, including:

(A) adult and child/adolescent services and combinations of services to be procured;

(B) percentage of service capacity to be procured for each RDM service package;

(C) the procurement methods to be used;

(D) timelines for conducting the procurement;

(E) steps and timelines for securing consumer choice decisions and transitioning consumers to new providers;

(F) for each service package, an estimate of the time needed to re-establish the service volume lost should a contract be terminated. This timeframe may be used as the minimum notice period for contract termination by an external provider; and

(G) any individual practitioner qualification(s) beyond those specified in the DSHS performance contract that the LMHA will establish as a minimum standard .

(9) Identification of services to be provided by a single provider due to economic factors that prevent an LMHA from offering consumers a choice of more than one provider.

(10) A description of how the LMHA will address consumer choice and access.

(11) A description of how service dollars will be preserved while maintaining the LMHA's ability to continue performing authority functions and administrative services related to the authority functions, which shall include a description of the LMHA's strategies, as described in subsection (f) of this section, for maximizing dollars available to provide services.

(12) A description of how the LMHA will address issues of cultural and linguistic diversity in the local community.

(13) A description of relevant past efforts to develop an external provider network and the results of those efforts.

(14) A description of barriers to attracting new external providers, the conditions that must be present to attract new external providers to the local service area, and the LMHA's plans to address any identified barriers, which may include any applicable existing agreements or circumstances identified by the LMHA pursuant to §412.758(a)(6) of this title.

(15) Plans and timeframes (covering at least two years) for developing the external provider network beyond the period covered by the current plan.

(h) Distribution of the draft plan. The LMHA shall send its draft local network development plan to local consumer and advocacy groups and shall also make it available to the public through its website and other accessible media. The LMHA shall invite public comment on the draft plan for a period of not less than 14 days and shall consider all comments received and make any revisions it deems appropriate to produce the proposed plan.

(i) Submission to DSHS. The LMHA shall submit its proposed local network development plan to DSHS with a summary of the public comments received and the LMHA's response to the comments. The LMHA shall also update its website with the proposed version of the plan, if applicable, and the date submitted to DSHS.

(j) Review by DSHS. DSHS will review each local network development plan to ensure compliance with the requirements of this subchapter and to determine whether the LMHA is

making reasonable attempts to solicit the development of an available and appropriate provider base that is sufficient to meet the needs of consumers in its local service area.

(1) Key elements addressed in the review process will include:

(A) the LMHA's assembly or expansion of a network of external providers;

(B) the procurement method(s) selected by the LMHA;

(C) maximization of access and consumer choice;

(D) preservation of critical infrastructure for ensuring the continuous provision of services;

(E) preservation of service dollars while maintaining the LMHA's financial viability to continue performing authority functions; and

(F) timeframes for implementation.

(2) In reviewing an LMHA's local network development plan, DSHS will evaluate the level of effort made by the LMHA to achieve compliance and the rationale and supporting documentation for its decisions and plans, including the LMHA's response to public comment. This evaluation will include a review of any previous efforts or plans of the LMHA to determine the level of implementation and progress toward assembling a network of external providers.

(3) DSHS will review each LMHA's local network development plan with consideration of the specific context of the local service area, including population density and distribution, existing service organizations, linguistic and cultural characteristics, and local priorities.

(4) DSHS will review any plan amendment submitted in accordance with subsection (m) of this section when the results of procurement do not achieve the planned provider network assembly or expansion. This review shall include examination of the rationale for the LMHA's decision not to procure part or all of the services planned for procurement, as well as the proposed scope of the LMHA's role as a service provider in the plan amendment.

(5) DSHS will establish a mechanism for stakeholder involvement in the review process.

(6) If DSHS determines that an LMHA's local network development plan demonstrates that the LMHA is in compliance with the requirements of this subchapter and is making reasonable attempts to solicit the development of an available and appropriate provider base that is sufficient to meet the needs of consumers in its local service area, DSHS will approve the plan within 60 days of receipt. DSHS may require the LMHA to make revisions

before DSHS approves the plan and will contact the LMHA within 60 days of receipt and include a timeframe for resubmission, which shall be negotiated with the LMHA.

(k) Approval of plan. After DSHS approves the local network development plan, the LMHA shall update public postings with the approved version of the plan and notice of the plan's approval by DSHS.

(l) Public access to plans. DSHS will provide a mechanism through the DSHS website for the public to access approved local network development plans.

(m) Post procurement plan amendment. If the results of a procurement alter the type or volume of services to be provided by the LMHA as described in its local network development plan, the LMHA shall submit a plan amendment to DSHS and update all publicly available copies of the plan after receiving approval from DSHS.

§412.758. LMHA Provider Status.

(a) The LMHA shall provide services only under one or more of the following conditions.

(1) The LMHA determines that interested qualified providers are not available to provide services in the LMHA's service area or that no providers met procurement specifications.

(2) The network of external providers does not provide the minimum level of consumer choice. A minimal level of consumer choice is present when consumers and their legally authorized representatives can choose from two or more qualified provider organizations in the LMHA's provider network for service packages and from two or more qualified individual practitioners in the LMHA's provider network for specific services within a service package.

(3) The network of external providers does not provide consumers of the LMHA's service area with access to services that is equivalent to or better than the level of access as of a date to be determined by DSHS. Any LMHA relying on this condition shall submit to DSHS information necessary for DSHS to verify level of access. DSHS will use the latest healthcare access technology available to the agency to measure access.

(4) The combined volume of services delivered by external providers is not sufficient to meet 100 percent of the LMHA's service capacity for each RDM service package as identified in the LMHA's local network development plan.

(5) The LMHA documents that it is necessary for the LMHA to provide certain services specified by the LMHA during the two-year period covered by the LMHA's local network development plan in order to preserve critical infrastructure to ensure continuous provision of services. Under this condition, the LMHA will identify a timeframe for transitioning to an external provider network, during which the LMHA procures an increasing proportion of

the service capacity of the external provider network in successive procurement cycles. The LMHA shall give up its role as a service provider at the end of the transition period when the network has multiple external providers if the LMHA determines that external providers are willing and able to provide sufficient added service volume within the timeframe specified by the LMHA in its approved local network development plan, as provided in §412.756(g)(8)(F) of this title (relating to local network development plan), to compensate for service volume lost should any one of the external provider contracts be terminated.

(6) Existing agreements impose restrictions on the LMHA's ability to contract with external providers for specific services during the two-year period covered by the LMHA's local network development plan, or existing circumstances would result in the loss of a substantial source of revenue that supports service delivery during the two-year period covered by the plan. If the LMHA invokes this condition, DSHS may require the LMHA to provide DSHS with a copy of the relevant agreement(s). Examples of such agreements and circumstances include:

(A) grants or other sources of funding that require direct service provision by the LMHA and that cannot be amended;

(B) buildings or other physical infrastructure that are not reasonably expected to be sold, leased, or otherwise disposed of;

(C) tax-exempt government bonds or other long-term financing that place restrictions on the LMHA's ability to meet its financial obligations, either in whole or in part; and

(D) leases or contracts that cannot be terminated.

(b) If the LMHA determines, based on the rationale provided in its approved local network development plan, that the LMHA will not assemble or expand the external provider network during the two-year period covered by the plan because of one or more of the conditions identified in subsection (a) of this section, the LMHA is authorized to provide services during the two-year period covered by the plan.

(c) If the LMHA determines, based on the rationale provided in its approved local network development plan, that the LMHA will not assemble or expand the external provider network during the two-year period covered by the plan because the current network of external providers delivers 100 percent of the service capacity and meets levels of consumer access and choice specified in subsections (a)(2) and (3) of this section, the LMHA is not authorized to provide services during the two-year period covered by the plan.

(d) If the LMHA determines, based on the rationale provided in its approved local network development plan, that it will procure services from external providers, the LMHA's role as a service provider shall be based on the approved local network development plan and the results of the procurement. Any results of procurement that would change the LMHA's provider

status described in its approved local network development plan shall be reflected in an approved amendment to the plan as required in §412.756(m) of this title.

(e) Implementation of this subchapter is not intended to require the LMHA to breach existing contracts or to lose or forego substantial revenue to support the provision of services. However, the LMHA shall give prospective funders information explaining the intent and requirements of this subchapter and the LMHA shall not condition receipt of funds upon direct service provision by the LMHA. This provision does not preclude an LMHA from entering into an agreement in which the funder requires direct service provision by the LMHA.

(f) If the LMHA provides services under one or more of the conditions described in subsection (a) of this section, the LMHA shall, in its local network development plan, identify the proportion of service capacity that must be provided by the LMHA in order to make service provision financially viable and the basis for the decision. If this determination is made following procurement, the plan shall be revised through an approved amendment as required in §412.756(m) of this title.

§412.760. Consumer Selection of Providers.

(a) Provider list. The LMHA shall maintain a list with information about all providers in its network, including the LMHA when applicable.

(1) The LMHA shall require each provider in the LMHA's provider network to supply the LMHA with complete and accurate information and promptly inform the LMHA of any changes.

(2) The information shall include:

(A) provider name;

(B) provider's service location(s) and the type of services or service packages provided at each location;

(C) contact information;

(D) provider's website address; and

(E) for each location and service, the languages in which services are available.

(3) The LMHA shall maintain the provider list with the most current information supplied by providers.

(4) The LMHA shall make the current provider list available on its website and distribute it at least annually to local consumer and advocacy groups.

(b) Provider forums. The LMHA shall establish periodic forums through which providers can present information to consumers, legally authorized representatives, and other stakeholders.

(c) Process for provider selection. The LMHA shall give consumers and their legally authorized representatives the information needed to select a provider as required in this subsection.

(1) After conducting an assessment, the LMHA shall give the consumer and legally authorized representative a description of the services recommended by the LMHA and the array of service options for which the consumer may be authorized.

(2) The LMHA shall inform the consumer or legally authorized representative that they may choose any available provider on the LMHA's provider network offering services for which the consumer is authorized and that they may change providers. The LMHA shall give each consumer and legally authorized representative the list of providers offering services for which the consumer is authorized.

(3) The LMHA shall make a telephone and appropriate space available for consumers and legally authorized representatives to use in selecting a provider.

(4) Consumers and legally authorized representatives shall be given a reasonable period of time to select a provider.

(5) If a consumer or legally authorized representative does not select a provider within the designated time frame, the LMHA shall assign a provider with assignments rotating equally among all available providers.

(6) All consumers and legally authorized representatives shall be given the list of providers offering services for which the consumer is authorized and be offered the option of choosing a new provider at every scheduled treatment plan review.

(7) At any time, consumers and legally authorized representatives may request and change providers, subject to approval by the LMHA. Consumers and legally authorized representatives may request a review of any decision the LMHA makes regarding a change of providers in accordance with §401.464 of this title (relating to Notification and Appeals Process).

(8) The LMHA shall maintain documentation of the consumer's or legally authorized representative's provider selection.

§412.762. Procurement Principles.

(a) Procurement method. The LMHA shall develop and enforce procurement procedures that comply with applicable statutes and rules. The LMHA may procure mental health services required by the DSHS performance contract and the LMHA's approved network development

plan by any procurement method allowed by applicable statutes and rules that provides the best value to the LMHA.

(b) Relevant factors. The LMHA shall consider all relevant factors in determining best value, which may include:

(1) the delivery terms;

(2) the quality and reliability of the respondent's services;

(3) the extent to which the services meet the LMHA's needs;

(4) indicators of probable respondent performance under the contract, such as the respondent’s past performance, the respondent's financial resources and ability to perform, and the respondent's experience and responsibility;

(5) the impact on the ability of the LMHA to comply with laws and rules relating to historically underutilized businesses or relating to the procurement of services from persons with disabilities;

(6) the total long term cost to the LMHA of contracting for the respondent's services;

(7) the cost of any staff training associated with the contract;

(8) the contract price;

(9) the ability of the respondent to perform the contract and to provide the required services within the contract term, without delay or interference;

(10) the respondent's history of compliance with the laws relating to its business operations and the affected service(s) and whether it is currently in compliance;

(11) whether the respondent's financial resources are sufficient to perform the contract and to provide the service(s);

(12) whether necessary or desirable support and ancillary services are available to the respondent;

(13) the character, responsibility, integrity, reputation, and experience of the respondent;

(14) the quality of the facilities and equipment available to or proposed by the respondent;

(15) the ability of the respondent to provide continuity of services;

(16) the ability of the respondent to meet all applicable written policies, principles, regulations, and standards of care; and

(17) any other factor relevant to determining the best value for the LMHA in the context of a particular contract.

(c) Award. All competitively procured contracts must be awarded based on best value, as determined by considering all relevant factors.

(d) Renewal of mental health services contracts. The LMHA may renew a mental health services contract only if the contract meets best value as determined by considering all relevant factors.

§412.764. Request for Proposals.

If the LMHA procures mental health services through a request for proposal (RFP), the LMHA shall comply with the provisions of this section.

(1) The LMHA shall develop a draft RFP. The LMHA shall ensure the draft RFP includes all elements required by applicable statutes, rules, and procurement standards as well as:

(A) information related to the LMHA's purpose of procuring the services;

(B) the LMHA's transition goals for consumers;

(C) a detailed description of information to be included in a proposal, including:

(i) how the respondent will meet the cultural and linguistic needs of the consumers in the LMHA's local service area;

(ii) how the respondent will involve consumers, legally authorized representatives, and families at the policy and practice levels within the respondent's organization;

(iii) the respondent's transition goals for LMHA employees, if applicable;

(iv) the respondent's transition plan for consumers; and

(v) where and when the respondent will provide services within the LMHA's local service area;

(D) the maximum allowable rate for the services if the LMHA intends to reject any proposal with a rate that exceeds that amount.

(2) The LMHA shall publicize the draft RFP, request public comment on the draft RFP, and invite potential providers to describe the challenges in providing services in the LMHA's local service area. The public comment period must be at least 14 days. The LMHA shall publicize the draft RFP by:

(A) posting on the Electronic State Business Daily;

(B) posting on the LMHA's website;

(C) posting on the DSHS website;

(D) sending to providers known to be interested in providing services in the LMHA's local service area; and

(E) sending to local consumer and advocacy organizations.

(3) The LMHA shall consider all public comment in developing the final RFP. The final RFP must also include:

(A) instructions for the submission of questions concerning the procurement; and

(B) instructions for the submission of proposals.

(4) The LMHA shall publish an RFP Notice in accordance with paragraph (2)(A)-(E) of this section for at least 10 days, but not more than 90 days, prior to the due date for the submission of proposals. An RFP Notice must include:

(A) the contract term;

(B) a general description of the mental health service(s) to be purchased;

(C) the geographic area to be served;

(D) any limitations on who may submit a proposal;

(E) the procedures for obtaining the final RFP; and

(F) the date and time by which proposals must be received by the LMHA.

(5) The LMHA may not submit a proposal in response to its own RFP.

(6) The LMHA shall provide a copy of the final RFP to each person who requests one. The LMHA may not restrict competition by unreasonably eliminating or limiting participation in the procurement process.

(7) Minor changes to the final RFP may be made by the LMHA prior to the date designated for submission of proposals if everyone who has obtained the final RFP is notified of the changes and is provided equal opportunity to respond.

(8) The LMHA shall keep all information contained in proposals confidential until a contract has been awarded.

(9) The LMHA shall require that any changes to a proposal be made by the respondent in writing and be received by the LMHA prior to the submission date and time.

(10) The LMHA may validate any information in a proposal by using outside sources or materials.

(11) Award.

(A) For a proposal to be considered for award, the respondent must follow the instructions and meet the requirements specified in the final RFP.

(B) After the proposal submission date, the LMHA may obtain clarification or confirmation of information submitted in a proposal if such information is necessary to complete the award process; however, no respondent may be given information which would give that respondent a competitive advantage over any other respondent.

(C) Negotiations may be conducted with a respondent to complete the procurement process or to complete an evaluation of a proposal.

(i) If only one proposal is received that may be considered for award, the LMHA and the respondent may negotiate the contract requirements as necessary to complete the procurement process.

(ii) If more than one proposal is received that may be considered for award, the LMHA may negotiate to further evaluate proposals and to select one or more respondents for award; however, no respondent may be given information which will give that respondent a competitive advantage over any other respondent.

(D) The award of a contract procured through an RFP must be made in accordance with §412.762(c) of this title (relating to Procurement Principles).

(E) The LMHA may cancel an RFP without award.

§412.766. Open Enrollment.

If the LMHA procures mental health services through open enrollment, the LMHA shall comply with the provisions of this section.

(1) The LMHA shall develop a draft Request for Application (RFA). The LMHA shall ensure the draft RFA includes all elements required by applicable rules, statutes, and procurement standards, as well as:

(A) the rate of payment for the services and the method used to determine that rate;

(B) the percentage of service capacity the LMHA intends to procure through open enrollment;

(C) the geographic area to be served;

(D) the period of time during which the LMHA intends to accept applications;

(E) information related to the LMHA's purpose of procuring the services;

(F) the LMHA's transition goals for consumers;

(G) a detailed description of the LMHA's minimum requirements for a provider of the services to be procured, including requirements related to:

(i) the cultural and linguistic needs of the consumers in the LMHA's local service area;

(ii) the involvement of consumers, legally authorized representatives, and families at the policy and practice levels within the applicant's organization or individual practice;

(iii) transition goals for LMHA employees, if applicable;

(iv) transition plan for consumers; and

(v) location and hours of services; and

(H) a statement that the applicant must include information demonstrating how the applicant will meet the minimum requirements referenced in subparagraph (G) of this paragraph.

(2) The LMHA shall publicize the draft RFA, request public comment on the draft RFA, and invite potential providers to describe the challenges in providing services in the LMHA's local service area. The public comment period must be at least 14 days. The LMHA shall publicize the draft RFA by:

(A) posting on the Electronic State Business Daily;

(B) posting on the LMHA's website;

(C) posting on the DSHS website;

(D) sending to providers known to be interested in providing services in the LMHA's local service area; and

(E) sending to local consumer and advocacy organizations.

(3) The LMHA shall consider all public comment in developing the final RFA. The final RFA must also include:

(A) instructions for the submission of questions concerning the procurement; and

(B) instructions for the submission of applications.

(4) The LMHA shall publish an RFA Notice in accordance with paragraph (2)(A)-(E) of this section and must continuously and prominently display the RFA Notice at the LMHA's administrative office(s) as long as the LMHA is accepting applications. An RFA Notice must include:

(A) the contract term;

(B) a general description of the service(s) to be purchased;

(C) the geographic area to be served;

(D) the procedures for obtaining the final RFA;

(E) the date and time by which applications must be received by the LMHA; and

(F) a statement that the open enrollment procurement will close when the earliest of the following occurs:

(i) the date and time described in subparagraph (E) of this paragraph; or

(ii) the LMHA has received enough applications to meet the percentage of service capacity described in paragraph (1)(B) of this section and which qualify for award in accordance with paragraph (8)(B) of this section.

(5) The LMHA may not submit an application in response to its own RFA.

(6) The LMHA shall provide a copy of the final RFA to each person who requests one. The LMHA may not restrict competition by unreasonably eliminating or limiting participation in the procurement process.

(7) The LMHA shall require that any application submitted in response to an RFA include a statement that the applicant agrees to provide the specified mental health service(s) at the rate of payment described in the final RFA.

(8) Award.

(A) The LMHA may obtain clarification or confirmation of information submitted in an application.

(B) The LMHA must award a contract to all applicants:

(i) whose applications are complete;

(ii) whose applications were submitted before the procurement was closed as described in the RFA Notice pursuant to paragraph (4)(F) of this section; and

(iii) who meet all requirements specified in the final RFA.

(C) All contracts for the specific mental health services provided through open enrollment must contain the same contract term, conditions, provisions, and requirements.

(9) For every service procured through open enrollment after the effective date of this subchapter, the LMHA must, at least every two years:

(A) procure the service using the same RFA developed in accordance with paragraphs (1)-(3) of this section;

(B) procure the service using another RFA developed in accordance with paragraphs (1)-(3) of this section; or

(C) procure the service using another procurement method.